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18 UNITED STATES DISTRICT COURT  
19 CENTRAL DISTRICT OF CALIFORNIA

20 IN RE SNAP INC.  
21 SECURITIES LITIGATION

Case No. 2:17-cv-03679-SVW-AGR

**CLASS ACTION**

**MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT OF SNAP  
DEFENDANTS' MOTION TO  
DISMISS THE CONSOLIDATED  
COMPLAINT**

Date: February 26, 2018  
Time: 1:30 p.m.  
Courtroom: 10A  
Honorable Stephen V. Wilson

22 This Document Relates To: All Actions

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**TABLE OF ABBREVIATIONS**

<b>Abbreviation</b>	<b>Meaning</b>
Plaintiffs	Lead Plaintiff Thomas DiBiase and named Plaintiff David Steinberg
Complaint or Compl.	Plaintiffs' Consolidated Amended Class Action Complaint for Violation of the Federal Securities Laws
Snap or Company	Snap Inc.
Snap Defendants	Snap, Evan Spiegel, Robert Murphy, Andrew Vollero, Imran Khan, Joanna Coles, A.G. Lafley, Mitchell Lasky, Michael Lynton, Stanley Meresman, Scott D. Miller, and Christopher Young
Ex. _ at _	form for citation both to exhibit to Declaration of Boris Feldman submitted herewith and to page number of exhibit according to consecutive pagination of exhibits
S-1	Snap's Registration Statement on Form S-1, declared effective on March 1, 2017, including Form 424B4 Prospectus filed on March 3, 2017 (Ex. 1)
IPO	initial public offering
Exchange Act	Securities Exchange Act of 1934
Securities Act	Securities Act of 1933
S1:_	form for citation to page of S-1 according to consecutive pagination of exhibits
S1(2/2/17):_	form for citation to page of Snap's Registration Statement on Form S-1, filed February 2, 2017 (Ex. 2) according to consecutive pagination of exhibits
¶_	form for citation to paragraph of Complaint
Reform Act	Private Securities Litigation Reform Act of 1995
ASC	Accounting Standards Codification of Financial Accounting Standards Board
SEC	U.S. Securities & Exchange Commission
Class Period	March 2, 2017 to August 10, 2017 ( <i>see</i> ¶22)

## **INTRODUCTION**

This is a fraud case in search of a false statement. The 116-page Complaint in this case nowhere alleges a false or misleading statement or omission. The Snap Defendants therefore move to dismiss.

Plaintiffs make two challenges to the veracity of the S-1 filed in connection with Snap's IPO of March 2, 2017. Both are demonstrably meritless.

Plaintiffs first claim that the S-1 failed to disclose the actual, as opposed to potential, harm to Snap caused by competition from Instagram ("Instagram Claim"). But the S-1 makes clear that Snap disclosed the actual, already-existing – and not just potential, future – harm to Snap caused by competition from Instagram. Moreover, no further disclosure was required because the market had long since become aware of that competition and the harm it was already causing Snap.

Plaintiffs next claim that the S-1 failed to disclose the existence and substance of a complaint filed in January 2017 by Anthony Pompliano ("Pompliano Claim"). But the complaint's existence and substance were publicly known before the IPO. Plaintiffs also fail to plead that the S-1 included the alleged falsehoods challenged by Pompliano – because it did not. And Pompliano's information was long stale because his three-week tenure at Snap ended 17 months before the IPO.

Plaintiffs briefly suggest a third claim of falsity, but it is self-evidently baseless. The claim challenges the veracity of Defendants' statements in May 2017 that Snap does not engage in "growth hacking" – *i.e.*, artificial boosting of user numbers. According to Plaintiffs, those May statements were belied when Snap's CEO supposedly admitted in August 2017 that Snap does engage in growth hacking ("Growth Hacking Claim"). But the CEO's August statement does not admit to growth hacking. Instead, it criticizes *others* in the industry for growth hacking.

These pleading defects are sufficient to doom Plaintiffs' claims. In addition, the Exchange Act claims fail because of flawed scienter allegations, and the Securities Act claims fail for lack of damages. The Complaint should be dismissed.

## STATEMENT OF FACTS

### **A. Snap's Business**

Snap's main product is a mobile-phone camera application called Snapchat. S1:12. Snapchat enables people to communicate through short videos and images called "Snaps." *Id.* "Stories" are groups of Snaps that play in chronological order and are deleted within 24 hours. S1:13. Snap also features home-grown news coverage collated from user Snaps, as well as news and entertainment coverage via partnerships with leading news organizations. S1:13, 105-06, 114-15. Snap monetizes its user engagement by displaying paid advertisements in the application. S1:13, 38. Substantially all of Snap's revenue comes from advertising. S1:13, 29.

**Users.** Snap believes the "most reliable way to understand engagement on [its] platform" is by measuring Daily Active Users, or DAU. S1:74. This metric shows whether "people are continuing to invest their time, energy, and creativity in [Snap's] products." S1:74-75. That in turn drives Snap's advertising inventory. *Id.*

Snap defines a DAU as "a registered Snapchat user who opens the Snapchat application at least once during a defined 24-hour period." S1:61. If a user accesses the application multiple times in one day, only one DAU is counted. S1:35. Snap's quarterly DAU have grown continually since the first quarter of 2014, the first quarter for which the metric was disclosed. S1(2/2/17):250-51.

**Monetization.** In 2016, Snap recorded revenue of \$404.5 million. S1:77. Revenue in the first three quarters of 2017 was \$539.3 million. Ex. 3 at 259.

### **B. Snap's IPO and S-1**

On March 1, 2017, Snap registered its IPO. ¶93. Snap and selling stockholders offered 200,000,000 shares of Class A stock. S1:19. The stock was priced at \$17 per share. *Id.* The S-1 noted that in the quarter before the IPO, Snap had 158 million DAU and revenue of \$165.6 million. S1:26, 79.

The S-1 also included an abundance of negative disclosures. It stated as a fact that "increased competition" caused Snap's "flat growth": "[W]e believe that the *flat*

1 *growth* in the quarter [4Q16] *was primarily related to* accelerated growth in user  
2 engagement earlier in the year, diminished product performance, and *increased*  
3 *competition.*” S1:75 (emphasis added). It stated that the competition was global and  
4 was due to competitors’ launch of similar products: “[W]e also saw increased  
5 competition both domestically and internationally in 2016, as many of our  
6 competitors launched *products with similar functionality to ours.*” *Id.* (emphasis  
7 added). And it expressly identified “Instagram” as one such competitor: “We face  
8 significant competition in almost every aspect of our business both domestically and  
9 internationally. This includes larger, more established companies such as . . .  
10 *Instagram[.]*” S1:32 (emphasis added). Finally, the S-1 explained that Instagram had  
11 adopted a “Stories” feature that “largely mimics [Snap’s] Stories feature.” *Id.*

12 Besides this *existing* competition, the S-1 disclosed warnings about *future*  
13 performance. Snap warned investors not to assume any particular growth trajectory  
14 from Snap’s historical performance. S1:37. And it warned: “We anticipate that the  
15 growth rate of our user base will decline over time” (S1:26); “Our Daily Active  
16 Users may not continue to grow” (*id.*); and “we are unable to predict” or “control”  
17 our “ability to maintain and grow our user base and user engagement” (S1:37).

18 On March 2, 2017, the first day of trading, Snap’s share price closed at  
19 \$24.48 on the New York Stock Exchange. Ex. 4; ¶283a.

### 20 **C. Q1 and Q2 Results**

21 After the market closed on May 10, 2017, Snap announced Q1 results. ¶168.  
22 Snap reported 166 million DAU, a 36% increase over the same quarter the prior  
23 year, and a 5% increase over the prior quarter. *Id.* On May 11, 2017, Snap’s share  
24 price closed at \$18.05, down \$4.93 from the prior day’s closing price. ¶169.

25 After the market closed on August 10, 2017, Snap announced Q2 results.  
26 ¶193. Snap reported 173 million DAU, a 21% increase over the same quarter the  
27 prior year, and a 4% increase over the prior quarter. *Id.* On August 11, 2017, Snap’s  
28 share price closed at \$11.83, down \$1.94 from the prior day’s closing price. ¶194.



1 with particularity facts giving rise to a strong inference that the defendant acted with  
2 the required state of mind.” 15 U.S.C. § 78u-4(b)(2)(A). In assessing scienter, a  
3 court must consider not only inferences favoring the plaintiff but also “plausible,  
4 nonculpable explanations for the defendant’s conduct[.]” *Tellabs, Inc. v. Makor*  
5 *Issues & Rights, Ltd.*, 551 U.S. 308, 323-24 (2007).

### 6 **B. Section 11**

7 To state a § 11 claim, Plaintiffs must allege that the S-1 contained an “untrue  
8 statement of a material fact” or “omitted to state a material fact required to be stated  
9 therein or necessary to make the statements therein not misleading[.]” 15 U.S.C. §  
10 77k(a). A § 11 complaint must satisfy Rule 12(b)(6) and, when “sounding in fraud,”  
11 the heightened requirements of Rule 9(b). *Supra* Point I.A.; *In re Daou Sys., Inc.*  
12 *Sec. Litig.*, 411 F.3d 1006, 1027 (9th Cir. 2005). A § 11 claim “sounds in fraud”  
13 where a plaintiff relies on the same alleged misconduct as in its § 10(b) claims.  
14 *Rubke v. Capitol Bancorp, Ltd.*, 551 F.3d 1156, 1161 (9th Cir. 2009). A plaintiff’s  
15 disclaimer that he is alleging fraud (*e.g.*, ¶¶301, 380) cannot be taken at face value.  
16 *In re Rigel Pharm., Inc. Sec. Litig.*, 697 F.3d 869, 885 (9th Cir. 2012).

17 Here, Plaintiffs’ § 11 claims sound in fraud. Underlying all of their claims is  
18 the same alleged misconduct: the S-1’s asserted failure to disclose the competition  
19 from Instagram and the inaccuracies in user metrics alleged by Pompliano. *Compare*  
20 ¶¶93-160, 226-60 (§ 10(b) claims), *with* ¶¶324-79 (§ 11 claims); *see also* ¶¶39-92.  
21 Moreover, Plaintiffs allege, as part of their § 11 claim, that competition from  
22 Instagram was “known” within Snap and “directly communicated to Snap’s senior  
23 management,” and that Defendants “[c]onceal[ed]” Pompliano’s allegations. *E.g.*,  
24 ¶¶329, 331, 335-36, 350, 352. These allegations indisputably sound in fraud.

### 25 **C. Unnamed Witnesses**

26 Where a plaintiff relies on statements from unnamed witnesses, plaintiff must  
27  
28 personal knowledge as to themselves and their own acts, and *upon information and belief as to all other matters.*” (emphasis added)).

1 satisfy two tests. First, the witnesses must be described with sufficient particularity  
2 “to establish their reliability and personal knowledge.” *Zucco Partners, LLC v.*  
3 *Digimarc Corp.*, 552 F.3d 981, 995 (9th Cir. 2009). That is, the complaint must  
4 allege “sufficient detail about a confidential witness’ position within the defendant  
5 company” to demonstrate the witness’s personal knowledge of the facts reported. *Id.*  
6 Second, “statements which are reported by confidential witnesses with sufficient  
7 reliability and personal knowledge must themselves be indicative of scienter.” *Id.*

## 8 **II. PLAINTIFFS FAIL TO STATE AN EXCHANGE ACT CLAIM**

### 9 **A. Plaintiffs Fail to Allege a False or Misleading Statement or Omission**

#### 10 **1. Instagram Claim**

##### 11 **a. The S-1 Disclosed Actual, Not Just Potential, Harm**

12 According to Plaintiffs, Snap knew that Instagram competition actually *did*  
13 harm Snap’s user growth, but merely disclosed that Instagram competition *may*  
14 cause such harm. ¶¶102-03. That is simply wrong. In fact, the S-1 disclosed that  
15 Instagram’s competition *did* harm user growth. Plaintiffs can allege otherwise only  
16 by cherry-picking their preferred sentences from the document and ignoring others.  
17 But the Court must consider the S-1 as a whole, not out-of-context snippets. *In re*  
18 *Stac Elecs. Sec. Litig.*, 89 F.3d 1399, 1405 n.4 (9th Cir. 1996) (on motion to dismiss,  
19 court should “consider[] the full text of the Prospectus, including portions which  
20 were not mentioned in the complaints”).

21 As set forth *supra* at 2-3, the S-1 states that “increased competition” caused  
22 Snap’s “flat growth”: “[W]e believe that the flat growth” in Q4 “was primarily  
23 related to accelerated growth in user engagement earlier in the year, diminished  
24 product performance, and increased competition.” S1:75. It states that the “increased  
25 competition” arose because competitors – including “Instagram” – “launched  
26 products with similar functionality to ours.” S1:32, 75. And it explicitly calls out  
27 Instagram Stories as a specific product that mimics Snapchat’s offerings. S1:32.

28 Given these abundant disclosures regarding existing Instagram competition, it

1 is specious to allege that the S-1 merely spoke about potential future harm (*e.g.*,  
2 ¶102). Snap disclosed that its growth was *already* being slowed by “increased  
3 competition.” S1:75. Snap disclosed that this “increased competition” was *already*  
4 global and was *already* caused by competing offerings with “similar functionality.”  
5 *Id.* Snap disclosed that this “increased competition” *already* included Instagram’s  
6 “significant competition” with Snap. S1:32. And Snap disclosed that Instagram  
7 *already* had adopted a “Stories” feature that was a Snap clone. *Id.* These disclosures  
8 dispose of Plaintiffs’ claim. *See PAR Inv. Partners, L.P. v. Aruba Networks, Inc.*,  
9 681 F. App’x 618, 619-20 (9th Cir. 2017) (10(b) claim dismissed where company  
10 identified competitor and disclosed action already taken by competitor); *Stac Elecs.*,  
11 89 F.3d at 1406 (10(b) claim dismissed where Microsoft competition was disclosed  
12 by statements that “[a] number of competitors offer products that currently compete  
13 with [Stac’s] products”).

14 The Complaint tries to undercut these disclosures by selectively quoting  
15 sentences from the S-1 and ignoring others – a sleight-of-hand employed throughout  
16 the pleading. For example, the S-1 identifies three causes of flat growth for 4Q16  
17 (S1:75), but the Complaint’s itemization of Snap’s “false and misleading statements  
18 and omissions” (¶¶226-60) simply ignores two of the three, including “increased  
19 competition.” Indeed, while the Complaint elsewhere quotes this S-1 passage in full  
20 (¶99), it misleads in paragraph 229. That paragraph of the Complaint says: “229.  
21 The Registration Statement attributed the relatively flat DAU growth in the 4Q 2016  
22 as being ‘***primarily related to accelerated growth in user engagement earlier in the***  
23 ***year.***’” (Emphasis in Complaint). By contrast, the actual S-1 passage that paragraph  
24 229 is purporting to quote states that that relatively flat growth was “***primarily***  
25 ***related to accelerated growth in user engagement earlier in the year, diminished***  
26 ***product performance, and increased competition.***” S1:75 (emphasis added). The  
27 Complaint’s § 10(b) allegations also ignore Snap’s disclosure of the fact that  
28 competitors “launched products with similar functionality to ours” (*id.*); only the §

1 11 allegations mention that disclosure (§344). Finally, as shown by the competition-  
2 related disclosures mentioned above, the Complaint is flat-out wrong when it says  
3 the “only” disclosure made by Snap regarding Instagram’s impact was the sentence,  
4 “‘Instagram, a subsidiary of Facebook, recently introduced a ‘stories’ feature that  
5 largely mimics our Stories feature and may be directly competitive.’” §231 (quoting  
6 S1:32).<sup>2</sup> In fact, Snap listed Instagram among its competitors and said it believed  
7 competition was cutting into its growth. *Supra* at 2-3, 6-7. Plaintiffs cannot state an  
8 “omissions” claim by ignoring Snap’s most relevant disclosures.

9       Regarding Snap’s statement that Instagram Stories “may be directly  
10 competitive,” Plaintiffs place more weight on the word “may” than it will bear.  
11 According to Plaintiffs, the word “may” conceals the harm caused by Instagram  
12 Stories. §§102-04. Not so. Read in the context of Snap’s above-described  
13 disclosures of harm *already* caused by Instagram’s competition, the word “may”  
14 functioned not to deny past harm (*e.g.*, §§102, 103, 231), but to warn of future harm.  
15 The statement at issue is in the S-1’s risk disclosures. S1:26. Those disclosures  
16 inherently warn about possible adverse events in the future. Thus, the disclosures  
17 often use words indicating future potentiality, like “may” and “could.” Examples  
18 abound: “Our Daily Active Users *may* not continue to grow”; “There are many  
19 factors that *could* negatively affect user retention, growth, and engagement . . . .  
20 [O]ur competitors *may* mimic our products and therefore harm our user engagement  
21 and growth . . .”; “[O]ur competitors *may* acquire and engage users at the expense of  
22 our user growth or engagement, which *may* seriously harm our business.” S1:26, 32  
23 (emphases added). Given this context, and the many disclosures of Instagram’s *past*  
24 harm to Snap, no one could read the word “may” as nullifying those disclosures.

25       Insofar as Plaintiffs fault Snap for not stating that *Instagram Stories* – as  
26 opposed to just *Instagram* – had already harmed Snap’s growth (§94), they are  
27

28 <sup>2</sup> See also §107 (citing *wrong* disclosure in effort to allege that Snap’s disclosure  
was inadequate to warn of Instagram’s competition and its effect on Snap’s growth).

1 doubly mistaken. Snap disclosed the harm from competition by “Instagram” (S1:32,  
2 75), and nothing in that disclosure excludes any particular Instagram feature, such as  
3 Instagram Stories. In any event, Snap expressly stated that Instagram Stories  
4 “largely mimics our Stories feature.” S1:32. More disclosure was unnecessary.

5 **b. The Instagram Matter Was Already in the Public Domain**

6 Plaintiffs’ Instagram claim also fails for a separate reason: By the time of the  
7 IPO, the market had already been informed that Instagram and Instagram Stories  
8 were harming Snap’s growth. Defendants had no obligation to disclose information  
9 already in the public domain. *Rubke*, 551 F.3d at 1162-63 (no duty to disclose  
10 publicly available information); *In re Syntex Corp. Sec. Litig.*, 95 F.3d 922, 933-34  
11 (9th Cir. 1996) (affirming dismissal of 10(b) claim based in part on market’s  
12 awareness of “the risks of competition from outsiders”); *see also In re XM Satellite*  
13 *Radio Holdings Sec. Litig.*, 479 F. Supp. 2d 165, 181 (D.D.C. 2007) (noting that  
14 company has “no duty to disparage its own competitive position in the market”).

15 The Complaint itself concedes that the matter was in the public domain by the  
16 time of the IPO. Paragraph 76 quotes a November 2016 article whose content and  
17 reader comments showed the market’s awareness that Instagram copied Snapchat’s  
18 Stories and was grabbing Snap’s market share. Ex. 5. The article told the market that  
19 the same “ephemerality” making Snap distinctive (§§75-76) was now also making  
20 Instagram Stories distinctive (§76). The article openly concluded that Instagram had  
21 copied Snapchat Stories: “Instagram is combining the best of Snapchat and  
22 Periscope . . . . Now Direct will have an ephemeral Stories messages bar . . . . It’s  
23 much like how you can send Snapchat Stories as private messages, but adds in a  
24 groups feature.” Ex. 5 at 266, 268.

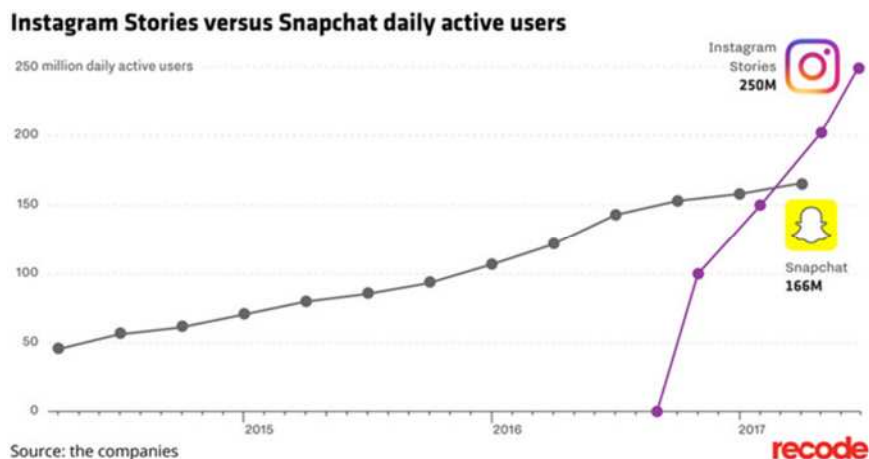
25 As the reader comments showed, the market understood two things upon the  
26 article’s publication. First, it understood that Instagram Stories had copied Snapchat  
27 Stories. One reader noted: “Instagram is blatantly copying all of snapchat’s original  
28 features here.” *Id.* at 271. Second, it understood this copying was hurting Snap’s

1 growth. Wrote one reader: “Goodbye Snapchat and Periscope. I think this was the  
2 last tool Instagram needed to takeover their markets.” *Id.* Another stated: “They are  
3 trying to complete their takeover of Snapchat’s market obviously.” *Id.* All such  
4 comments dated to November-December 2016. They show that, by the time of the  
5 IPO, the market was aware of both the copying by Instagram and the consequent  
6 pressure on Snap’s growth. A later article confirmed this awareness, reporting:  
7 “Instagram Stories is stealing Snapchat’s users.”<sup>3</sup> No more disclosure was needed.

### 8 **c. Plaintiffs’ “Existential Threat” Thesis Fares No Better**

9 Plaintiffs’ Instagram claim also fails for a broader reason: The “fact” they  
10 claim Snap should have disclosed is no fact at all. Plaintiffs’ general thesis is that  
11 Instagram Stories had “eviscerat[ed]” Snap’s user growth and caused “extremely  
12 adverse and highly negative” growth (¶¶8-9), and that Snap was obliged to reveal  
13 this to the market. But that narrative is refuted by the Complaint’s own allegations.

14 The Complaint shows that, following Instagram Stories’ launch in August  
15 2016 (¶74), Snap’s DAU grew each and every quarter, from 153 million to 158  
16 million to 166 million to 173 million. ¶¶96, 193. Moreover, the graph that allegedly  
17 depicts Instagram’s mortal blow to Snap (¶105) actually shows no such thing:



25 Snap’s growth curve is positive before and after the launch of Instagram Stories.

26  
27 <sup>3</sup> See Josh Constine, Jan. 30, 2017, “Instagram Stories is stealing Snapchat’s users,”  
28 *TechCrunch* (“[T]he consensus from our sources is that [Snap’s user metrics would]  
be higher if not for Instagram Stories, and Snapchat’s long-term growth, especially  
internationally, will be hindered by the competition.”) (Ex. 6 at 274).

1 The data in the Complaint thus belie Plaintiffs’ thesis. Plaintiffs cannot insist that  
2 Snap should have disclosed that its user base had been “eviscerated” when it had  
3 not. Snap disclosed that Instagram was a competitive product, that it had mimicked  
4 Snapchat, and that that competition was having an impact on growth. The data on  
5 which Plaintiffs themselves rely do not support disclosures that go any further.

6 Even if some investors were disappointed by the DAU figures in 1Q17 and  
7 2Q17 (*e.g.*, ¶¶170, 181-83, 201-03), that is hardly sufficient to allege fraud. Fraud  
8 requires a false or misleading statement, and nothing in the statements to which  
9 Plaintiffs point (¶¶226-60) is false or misleading. To the contrary, Snap informed  
10 investors of its past and present DAU figures. ¶¶96, 193. Snap disclosed the fact of  
11 competition generally, competition from Instagram, and Instagram Stories’ mimicry  
12 of Snap’s Stories feature. *Supra* at 6-7. And Snap repeatedly warned investors about  
13 future risks, including that “[w]e anticipate that the growth rate of our user base will  
14 decline over time” (S1:26) and that “Our Daily Active Users may not continue to  
15 grow” (*id.*). No more was required. Indeed, these disclosures were so detailed that  
16 they are sufficient *by themselves* to dispose of any claim that Snap masked actual  
17 harm as potential harm. *See Plevy v. Haggerty*, 38 F. Supp. 2d 816, 832 (C.D. Cal.  
18 1998) (given company’s “abundant and specific” risk disclosures, investors “cannot  
19 be heard to complain that the risks were masked as mere contingencies.”).

## 20 **2. Pompliano Claim**

21 Plaintiffs next argue that the S-1 was misleading because it did not disclose  
22 the “existence and substance” of Pompliano’s state-court complaint. ¶242. That  
23 complaint is baseless, as Snap’s pleadings in the case make clear. But, even  
24 assuming *arguendo* that Pompliano’s allegations are true, Plaintiffs’ argument fails  
25 because the “existence and substance” were publicly known before the IPO, and  
26 Plaintiffs’ ASC 450 claims are baseless.

### 27 **a. Existence of Pompliano Complaint**

28 ***Existence of Complaint Was in Public Domain.*** The Pompliano complaint’s

1 existence was publicly known before the S-1 was filed. It was publicly filed on  
2 January 4, 2017. *See* Ex. 7. While some allegations were redacted, many others –  
3 along with the caption and the parties’ identities – were not. *Id.* Furthermore, the  
4 Pompliano complaint’s existence was reported in the press before the S-1 was filed.  
5 Plaintiffs themselves (¶158) cite a *Business Insider* article dated January 5, 2017  
6 that discloses the lawsuit and reproduces the whole redacted complaint – with the  
7 first page visible – within the article: “A former Snapchat employee is accusing the  
8 company of lying to investors as it pursues its plans to go public. In a lawsuit filed  
9 in California on Wednesday, former growth lead Anthony Pompliano alleges that  
10 the company has been ‘falsely misrepresenting’ itself . . . . [Y]ou can read  
11 Pompliano’s full court filing below.” Ex. 8 at 315.<sup>4</sup> Many other articles pre-dating  
12 the S-1 reported the lawsuit’s existence. *E.g.*, Exs. 10-14. The public filing and press  
13 articles leave no doubt that the existence of the Pompliano complaint was in the  
14 public domain prior to the IPO and thus did not need to be disclosed. *See Rubke*, 551  
15 F.3d at 1162-63; *In re Bank of Am. AIG Disclosure Sec. Litig.*, 980 F. Supp. 2d 564,  
16 576-77 (S.D.N.Y. 2013), *aff’d*, 566 F. App’x 93 (2d Cir. 2014); *see also Heliotrope*  
17 *Gen., Inc. v. Ford Motor Co.*, 189 F.3d 971, 981 n.18 (9th Cir. 1999).

18 ***ASC 450 Claims Fail.*** Plaintiffs nonetheless claim the Pompliano complaint  
19 should have been disclosed under GAAP accounting guidelines. That argument also  
20 fails. The standard they cite, ASC 450 (¶115), provides accounting guidance for  
21 disclosure of certain loss contingencies. ASC 450 requires disclosure if a financial  
22 loss is “‘reasonably possible’” (*id.*), but it does not apply “to immaterial items,”  
23 ASC 105-10-05-6, and an item is only “material” if the reasonably possible loss is a  
24 certain size.<sup>5</sup> Moreover, GAAP “‘tolerates a range of reasonable treatments, leaving  
25 the choice among alternatives to management.’” *Luna v. Marvell Tech. Grp.*, 2016  
26

27 <sup>4</sup> *See also* ¶11 (“the lawsuit was reported in the press”).

28 <sup>5</sup> In assessing materiality, a company should consider quantitative factors such as  
“size in numerical or percentage terms[.]” SEC Staff Accounting Bulletin No. 99 –

1 U.S. Dist. LEXIS 141567, at \*15-16 (N.D. Cal. Oct. 12, 2016).

2 In light of these standards, it is clear that Plaintiffs' claim under ASC 450  
3 lacks any substance. Plaintiffs do not allege that the reasonably possible financial  
4 damages from Pompliano's lawsuit – a lawsuit by an at-will employee terminated  
5 after only three weeks (¶¶11, 156) – would be material considering Snap's \$404.5  
6 million in 2016 revenue. S1:77. More to the point, Plaintiffs offer no substantive  
7 allegation indicating that Snap's or its auditors' assessment of whether loss was  
8 "reasonably possible" fell outside "the range of reasonable treatments" left to  
9 management. *See Luna*, 2016 U.S. LEXIS 141567, at \*15-16. They therefore fail to  
10 state a claim based on ASC 450.

11 Furthermore, Snap's GAAP assessment is an opinion statement, and the  
12 Supreme Court and Ninth Circuit have held that a falsity challenge to such an  
13 opinion must be pled with particularity. *Align*, 856 F.3d at 613-19 (falsity of opinion  
14 must be pled with particularity under §§ 10(b) and 11) (citing *Omnicare, Inc. v.*  
15 *Laborers Dist. Council Constr. Indus. Pension Fund*, 135 S. Ct. 1318, 1323-26  
16 (2015)). In *Align*, the Ninth Circuit held that a company's assessment of "whether  
17 goodwill impairment is 'more likely than not'" was an opinion. *Id.* at 613-14, 617.  
18 Because plaintiffs failed to "plead the exact assumptions that [the company] used"  
19 in its assessment, the pleading was deficient. *Id.* at 618. Here, too, Snap's  
20 assessment under ASC 450 is management's opinion. Plaintiffs were thus required  
21 to "plead the exact assumptions that [Snap] used" in its assessment. *See id.* They did  
22 not do so. The Complaint does not show that the decision not to disclose was  
23 anything other than a "permissible business judgment." *Luna*, 2016 U.S. Dist.  
24 LEXIS 141567, at \*21.

25 **b. Substance of Pompliano Complaint**

26 ***Substance of Complaint Was in Public Domain.*** The *substance* of the  
27

28 Materiality (August 12, 1999) (noting that a 5% threshold "may provide the basis  
for a preliminary assumption" that an item is "unlikely to be material.").

1 Pompliano complaint was also in the public domain before the S-1. Plaintiffs  
2 complain both that the S-1 failed to disclose Pompliano's allegations that "Snap's  
3 User Metrics were Unreliable," and that Snap should have disclosed "the nature of  
4 his claims." Compl. p. 70; ¶245. But both Pompliano's allegations that "Snap's User  
5 Metrics were Unreliable" and "the nature of his claims" had been blasted around the  
6 world long before the IPO. Snap's motion to compel arbitration, which was publicly  
7 filed on January 18, 2017, twice disclosed that substance. Ex. 9 at 323 (Pompliano  
8 complaint included "allegations about Snap giving investors false user metrics back  
9 in 2015"); *id.* at 325 (Pompliano complaint alleged "that Snap was telling investors  
10 in mid-2015 that it had obtained a certain number of users, when its own internal  
11 metrics were showing a slightly lower figure"). Meanwhile, in January 2017, several  
12 articles disclosed the same substance. *Bloomberg* stated: "Snap Inc. was sued by a  
13 former employee who says the company . . . was inflating growth metrics ahead of a  
14 planned [IPO]." Ex. 10. *Forbes* added: "In a lawsuit filed in the Los Angeles County  
15 Superior Court on Wednesday, Anthony Pompliano . . . said the company inflated  
16 key growth metrics as it was recruiting him from Facebook. Pompliano also said  
17 Snapchat . . . shared the inflated metrics with some investors . . . in an effort to  
18 bolster its standing ahead of a planned [IPO]." Ex. 11. *See also* Exs. 12-14. Nor can  
19 Plaintiffs argue that, while the allegation of inaccurate metrics was public, the  
20 examples alleged by Pompliano (¶¶69-70) were not. An allegation of inaccuracy in  
21 "user metrics" is broader than, and thus subsumes, any alleged example of an  
22 inaccurate metric.

23 Thus, the Pompliano complaint's substance – allegations of inaccuracies in  
24 Snap's "user metrics," "growth metrics," and "number of users" – was public before  
25 the S-1 was filed. No more disclosure was required. *Rubke*, 551 F.3d at 1162-63.

26 ***False Statements Alleged by Pompliano Not in S-1.*** Plaintiffs separately note  
27 that Pompliano alleged that Defendants made false statements concerning Snap's  
28 user metrics in 2015. But the alleged false statements to which they point were not

1 included in the S-1 or otherwise made during the Class Period, and Plaintiffs do not  
2 allege otherwise. These Pompliano allegations are thus irrelevant. *In re REMEC Inc.*  
3 *Sec. Litig.*, 702 F. Supp. 2d 1202, 1222-23 (S.D. Cal. 2010) (“A defendant may be  
4 held liable . . . only for the statements made during the class period.”).

5 First, Pompliano alleged that Snap’s DAU figures for the pre-June 2015  
6 period were incorrect. But Plaintiffs concede that Snap restated the figures and that  
7 the S-1 included the restated figures. ¶¶13, 238, 261.

8 Second, Pompliano alleged that Snap’s registration flow completion rate was  
9 inaccurate in 2015. ¶¶70, 144, 149. But Plaintiffs do not allege that any statement  
10 made in the S-1, or otherwise during the Class Period, mentioned this metric.

11 Third, Pompliano alleged that Snap’s user retention rate was inaccurate in  
12 2015. ¶¶70, 144, 149. But neither the S-1 nor any other Class-Period statement is  
13 alleged by Plaintiffs to have mentioned the user retention rate.

14 Fourth, Pompliano alleged that Snap claimed to have 100 million DAU at a  
15 time – in September 2015 – when, according to Pompliano’s calculations, Snap had  
16 no more than 95-97 million DAU. ¶142. But the S-1 discloses that Snap, for 3Q15  
17 (*i.e.*, July-Sept 2015), had quarterly average DAU of only 94 million.<sup>6</sup> S1:76; ¶227.  
18 That is, the S-1 disclosed a DAU figure that was *lower* than Pompliano’s figure.<sup>7</sup>  
19 And the first quarter for which the S-1 discloses a DAU figure of 100 million  
20 occurred *after* Pompliano left Snap. S1:76; ¶227.

21 Fifth, Pompliano alleged that Snap claimed to have a double-digit month-  
22 over-month figure for the rate of DAU growth. ¶¶69, 136, 139, 143. But a double-  
23 digit month-over-month growth rate for DAU is not included in the S-1 or in any  
24

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25 <sup>6</sup> For prior quarters, the S-1 discloses even lower DAU figures. S1:76; ¶227.

26 <sup>7</sup> The S-1 mentioned that, while Snap calculates quarterly DAU based on average  
27 DAU for the *entire quarter*, Snap’s competitors calculate it based on average DAU  
28 for the *last month of the quarter*. S1:77. Thus, it is the *competitors’* calculations that  
omit earlier (lower) figures in the quarter and arguably overstate the quarterly DAU  
figure. While, for comparison purposes only, the S-1 set forth its DAU figures using  
the competitors’ method – which resulted in a figure of 99 million DAU for  
September 2015 – the S-1 made clear that Snap *rejects* the competitors’ method. *Id.*

1 other Class-Period statement. The S-1 discloses year-over-year growth rates, *see*  
2 S1:76; ¶227, but it does not mention month-over-month growth rates at all. In sum,  
3 no actionable statement concerning any of these metrics is alleged by Plaintiffs.

4 **c. The S-1 Need Not Credit Pompliano**

5 Finally, Plaintiffs call the S-1 misleading because it does not state that Snap’s  
6 restatement of the DAU figures for the pre-June 2015 period was “prompted” by  
7 Pompliano. ¶113. This challenge fails on two grounds.

8 First, Plaintiffs’ premise – that the restatement was prompted by Pompliano –  
9 lacks the particularized allegations required by the Reform Act and Rule 9(b). *Supra*  
10 Point I.A. Because a dismissal motion cannot rely on facts outside the Complaint,  
11 Defendants do not here contend (although they could) that the restatement occurred  
12 *before Pompliano ever worked at Snap*. Even within the bounds of Rule 12(b)(6),  
13 Plaintiffs’ premise fails because Plaintiffs do not allege that Pompliano was in a  
14 position to know whether Snap had already made the restatement – for example, in  
15 presentations to investors. Indeed, Plaintiffs themselves allege that Snap was  
16 “siloe” and that, except for top management, employees in one group had no  
17 meaningful information about other employees’ work. ¶58. That allegation negates  
18 any inference that Pompliano, whose job concerned user growth (¶¶11, 36, 67),  
19 knew whether representations to investors included correct DAU figures. Absent  
20 any allegation that Pompliano was in a position to know whether Snap was already  
21 providing restated figures, the claim that he “prompted” a correction does not even  
22 meet Rule 8 pleading standards, much less the higher standard applicable here.

23 Second, the asserted fact that Pompliano “prompted” Snap’s restatement of  
24 the DAU figures is irrelevant to whether the S-1 was truthful. The S-1 excluded the  
25 metrics alleged by Pompliano to be false. ¶¶236-40; *supra* at 14-16. That exclusion  
26 demonstrates the truthfulness, not the falsity, of the S-1. Given that exclusion,  
27 Plaintiffs make no sense when they allege that, by not crediting Pompliano, the S-1  
28 somehow understated the risk of inaccuracy in Snap’s metrics. ¶¶236-40.

### 3. Growth Hacking Claim

The Growth Hacking Claim is likewise unsupported by particularized allegations. According to Plaintiffs, Defendants' statements in May 2017 that Snap does not engage in "growth hacking" were proved false by the CEO's supposed statement in August 2017 that Snap does engage in "growth hacking." ¶¶253, 259; *see* ¶221. But the CEO's August 2017 statement says nothing of the sort.

Two terms are relevant here: "push notification" and "growth hacking." A "push notification" is simply a notification pushed from a company's server to the user interface. *See* "Push Notifications," WIKIPEDIA. "Growth hacking," by contrast, occurs when an internet company sends a user "push notifications" concerning content that is not highly relevant to the user, for the purpose of inducing the user to open the company's app and artificially inflate user numbers. ¶¶15, 179a, 186, 199.<sup>8</sup> Absent such indicia, a "push notification" is not "growth hacking."

In a conference call on May 10, 2017, analysts asked CEO Evan Spiegel why Snap's DAU growth was lower than expected. ¶¶177-79a. In response, Spiegel differentiated Snap from others in the industry that engage in "growth hacking, where you send a lot of push notifications to users, or you try to get them to do things that might be unnatural[.]" ¶179a. Spiegel also noted that growth hacking techniques are not "very sustainable over the long term" and "can ultimately impact our relationship with the customer." *Id.* Similarly, in a conference call on May 24, 2017, Imran Khan stated, "[W]e don't do anything to do growth hacking. We don't spam you all the time to add you as a net user." ¶186.

In a conference call on August 10, 2017, an analyst noted that Snap sends some push notifications and then asked Spiegel: If sending push notifications is not growth hacking, then "what are *others* doing that you consider to be growth hacking and not real DAU growth?" ¶199 (emphasis added). In response, Spiegel first stated

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<sup>8</sup> The Complaint's numbering is off. Following paragraph 179 are paragraphs "160" and then "180." For clarity, we refer to that paragraph "160" as paragraph "179a."

1 that the “most important thing for [Snap]” is that Snap notifies users of content  
2 “highly relevant” to the user. *Id.* Spiegel then stated that “people, as they become  
3 more reliant on push notifications, have sort of relaxed the standards there, and I  
4 think it’s important for our business.” *Id.*

5 Plaintiffs incorrectly read this comment as an admission that Snap engages in  
6 growth hacking and that growth hacking is important to Snap’s business. ¶¶221,  
7 253, 259. Context makes clear that Spiegel made no such admission. As in the May  
8 10 call, Spiegel’s August 10 comment differentiated Snap from others in the  
9 industry. Spiegel stated: (1) what is “important” for Snap is that, unlike Snap’s  
10 competitors, Snap notifies users of “highly relevant” content, but (2) other “people”  
11 in the industry (the “others” referred to in the analyst’s question) have become  
12 increasingly “reliant” on “push notifications” to drive user numbers and therefore  
13 have “relaxed” the relevance “standards” for those notifications. ¶199. Returning to  
14 his opening comment about what is “important” for Snap, Spiegel concluded that  
15 “it[]” – *i.e.*, notifying users of highly relevant content and thereby differentiating  
16 Snap from competitors – is “important” for Snap’s business. *Id.*

17 In short, Plaintiff’s Growth Hacking Claim rests on a misreading of Spiegel’s  
18 August 10 comment. Even if Plaintiffs tenuously argue, as a fallback, that the words  
19 “people” and “it[]” are ambiguous, ambiguities do not satisfy the Reform Act’s  
20 requirement of particularized factual allegations.

#### 21 **4. Italics and Boldface Are No Substitute for Falsity Allegations**

22 Failing to allege falsity, Plaintiffs unavailingly rely on typeface. That is,  
23 Plaintiffs italicize and boldface certain portions of the S-1 and investor calls as if to  
24 suggest that the emphasized portions are somehow misleading. *E.g.*, ¶¶12, 99, 100,  
25 102-03, 107, 110, 117, 199, 223, 230-31, 237, 245, 247. But any such suggestion  
26 fails because Plaintiffs offer no substantive basis for concluding that those  
27 statements are in fact misleading. *Lomingkit v. Apollo Educ. Grp. Inc.*, 2017 WL  
28 3172861, at \*8 (D. Ariz. Jul. 26, 2017) (“Plaintiffs provide no explanation why

1 these statements – especially the bolded and italicized sentence – are misleading  
2 beyond an allegation that the statement ‘omitted material facts.’”), *appeal docketed*,  
3 No. 17-16634 (9th Cir. Aug. 15, 2017).

4 **B. Plaintiffs Fail to Allege Scienter with Particularity**

5 **1. Instagram Claim**

6 Plaintiffs’ allegations regarding the Instagram Claim fail to raise a strong  
7 inference of scienter. The only such allegations that even arguably relate to scienter  
8 are those concerning two unnamed witnesses (“FE1” and “FE2”). ¶¶37-38, 79-83,  
9 232. But the FE1 and FE2 allegations do not satisfy the Reform Act’s heightened  
10 requirements for scienter pleading, *supra* Point I.A., C, as set forth in *Zucco*:

11 **FE1.** The FE1 allegations fail the first *Zucco* test, which requires detailed  
12 allegations establishing the unnamed witness’s reliability and personal knowledge.  
13 *Supra* Point I.C. The Complaint does not allege with particularity that FE1 worked  
14 at Snap during the Class Period, which began with the IPO on March 2, 2017.  
15 Although the Complaint alleges that FE1 worked at Snap until “early-2017” and “in  
16 the first quarter of 2017” (¶¶37, 79), these allegations are insufficient to establish  
17 that FE1 worked at Snap on or after March 2, 2017.<sup>9</sup>

18 Nor do the FE1 allegations explain the basis of FE1’s asserted knowledge  
19 about the matter described in the FE1 allegations. ¶¶79-81. The FE1 allegations do  
20 not say how FE1 knew that sales personnel told anything to executive management.

21 The FE1 allegations also fail the second *Zucco* test. *Supra* Point I.C.  
22 Allegations are not indicative of scienter if they do not state that a particular  
23 individual defendant had knowledge. Here, FE1 does not name any Individual  
24

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25 <sup>9</sup> See *Zucco*, 552 F.3d at 996 (rejecting allegations of unnamed witnesses who were  
26 not employed during class period); *In re Downey Sec. Litig.*, 2009 WL 2767670, at  
27 \*10 (C.D. Cal. Aug. 21, 2009) (same); *City of Roseville Emps.’ Ret. Sys. v. Sterling*  
28 *Fin. Corp.*, 963 F. Supp. 2d 1092, 1135 (E.D. Wash. 2013) (same), *aff’d*, 691 F.  
App’x 393 (9th Cir. 2017); see also 963 F. Supp. 2d at 1110-11 & n.8 (“unnecessary  
to consider” facts alleged by plaintiff to establish falsity, where facts were not  
clearly alleged to have occurred during class period).

1 Defendant, let alone allege that FE1 had personal contact with that Individual  
2 Defendant.<sup>10</sup> Alleging contact with generic groups – like “executive management”  
3 (§81), “senior management” (§78), and “senior executives” (§232c) – is insufficient.  
4 *Weiss v. Amkor Tech., Inc.*, 527 F. Supp. 2d 938, 954 (D. Ariz. 2007). Insofar as  
5 FE1 alleged that sales personnel told executive management merely of “concerns”  
6 regarding competition from Instagram, an employee’s subjective worries do not  
7 constitute the specific facts required by the Reform Act. *Karam v. Corinthian Colls.,*  
8 *Inc.*, 2012 U.S. Dist. LEXIS 188594, at \*18 (C.D. Cal. Aug. 20, 2012). Finally, that  
9 Snap faced competition from Instagram was disclosed in the S-1; by definition, it  
10 cannot belie any statement made by Defendants and cannot be indicative of scienter.

11 **FE2.** FE2 alleges that Snap held a company-wide meeting in January 2017 in  
12 which employees told Spiegel and other “senior executives” of “concerns” regarding  
13 competition from Instagram. ¶38. Those allegations fail the first *Zucco* test: FE2 is  
14 never alleged to have actually attended the meeting or to have had a reliable basis  
15 for knowing what happened there. Furthermore, the allegations concerned an event  
16 pre-dating the Class Period and thus should be rejected for that reason as well.

17 The FE2 allegations also fail the second *Zucco* test for the same reasons that  
18 the FE1 allegations fail that test. An employee’s “concerns” – *i.e.*, subjective  
19 worries – do not satisfy the specificity requirement. *Supra* at 20. And again, the S-1  
20 disclosed that Snap faced competition from Instagram. *Supra* at 2-3, 6-7.

## 21 **2. Pompliano Claim**

22 Plaintiffs’ claim that the Pompliano lawsuit should have been disclosed under  
23 ASC 450 fails to raise a strong inference of scienter because “a failure to follow  
24 GAAP, without more, does not establish scienter.” *Align*, 856 F.3d at 621 (citations

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25  
26 <sup>10</sup> *In re Cisco Sys., Inc. Sec. Litig.*, 2013 U.S. Dist. LEXIS 53137, at \*33-34 (N.D.  
27 Cal. Mar. 29, 2013) (rejecting allegations of unnamed witnesses for failure to allege  
28 direct contact between witnesses and any specific individual defendant); *Avila v.*  
*LifeLock Inc.*, 2016 U.S. Dist. LEXIS 104717, at \*13-17 (D. Ariz. Aug. 3, 2016)  
(rejecting allegations of unnamed witnesses that failed to particularize facts  
establishing personal knowledge of defendants’ alleged state of mind).

1 omitted). Where, as here, “the plaintiffs have failed to plead scienter, . . . the  
2 plaintiffs’ ASC 450 violation claim also fails[.]” *In re Lions Gate Entm’t Corp. Sec.*  
3 *Litig.*, 165 F. Supp. 3d 1, 22 n.6 (S.D.N.Y. 2016).

4 Moreover, even assuming *arguendo* that Pompliano told Spiegel and Vollero  
5 of the allegedly false metrics at issue in the Pompliano complaint, Plaintiffs’  
6 Pompliano-related allegations fail to raise a strong inference of scienter. Scienter  
7 refers to a defendant’s mental state when the defendant made a *class-period*  
8 *statement*. But none of the metrics Pompliano calls false was included in the S-1 or  
9 any other Class-Period statement. *Supra* at 14-16. Thus, Plaintiffs’ Pompliano-  
10 related allegations do not support scienter.

11 Relatedly, Pompliano could not possibly have information concerning the  
12 mental states of the Individual Defendants as of March 2, 2017. Pompliano left Snap  
13 on September 18, 2015 (¶156) – 17 months *before* the IPO. The information he  
14 purportedly acquired during his three-week stint at Snap was long stale by the IPO.  
15 *In re ICG Commc’ns, Inc. Sec. Litig.*, 2006 WL 416622, at \*12 (D. Colo. Feb. 7,  
16 2006) (rejecting allegations about defendant’s mental state four months prior to start  
17 of class period on December 9, 1999: “[P]laintiffs do not allege that Bryan was  
18 aware that the kind of problems described in the July, 1999, meeting continued  
19 through the fourth quarter of 1999, and the first and second quarters of 2000.”).

### 20 **3. Growth Hacking Claim**

21 Plaintiffs’ growth hacking allegations also fail to raise a strong inference of  
22 scienter. An inference of scienter can be established by alleging a contradiction  
23 between what an individual defendant stated and what that defendant knew at the  
24 time of the statement. Plaintiffs allege that Spiegel’s and Khan’s denials of growth  
25 hacking as of May 2017 were belied by Spiegel’s supposed admission of growth  
26 hacking in August 2017. ¶¶253, 259. But that allegation fails to establish any  
27 contradiction at all. Even assuming that Spiegel’s knowledge as of August 2017  
28 may be imputed *back* to Spiegel *and* Khan as of May 2017 – a double assumption

1 that is dubious and unsupported – Spiegel’s statement in August 2017 was *not* an  
2 admission of growth hacking. *Supra* at 17-18. Thus, no inference of scienter arose.

3 **4. The Complaint Otherwise Fails to Plead Scienter**

4 ***Negative Disclosures Negate Inference of Scienter.*** Defendants forthrightly  
5 made negative disclosures during the Class Period. *Supra* at 2-3. Those disclosures  
6 negate an inference of scienter. *Ziemba v. Cascade Int’l, Inc.*, 256 F.3d 1194, 1211  
7 (11th Cir. 2001) (disclosures “significantly undermine any hint of fraud”). Given  
8 that each negative disclosure risked depressing Snap’s stock price, the disclosures  
9 undermine Plaintiffs’ claim that Defendants were intending to artificially inflate  
10 Snap’s stock price. *Id.*; *see also IBEW Local 97 Pen. Fund v. Ltd. Brands, Inc.*, 788  
11 F. Supp. 2d 609, 630-31 (S.D. Ohio 2011) (questioning why defendants who were  
12 supposedly intending to artificially inflate stock price would make repeated negative  
13 disclosures).

14 ***Stock Sales Raise No Inference of Scienter.*** The mere allegation of stock  
15 sales by Spiegel and Murphy (¶225) is insufficient to allege scienter. As the Ninth  
16 Circuit put it: “not every sale of stock by a corporate insider shows that the share  
17 price is about to decline.” *Ronconi v. Larkin*, 253 F.3d 423, 435 (9th Cir. 2001).  
18 Plaintiff must allege that the amount and timing of the sale were suspicious; to be  
19 suspicious, stock sales must have been made ““at times calculated to maximize the  
20 personal benefit from undisclosed inside information.”” *Zucco*, 552 F.3d at 1005.

21 Here, Plaintiffs allege nothing suspicious about the amount or timing of the  
22 stock sales. Stock sales by insiders in their company’s IPO are not suspicious. *In re*  
23 *Accuray, Inc. Sec. Litig.*, 757 F. Supp. 2d 936, 950 (N.D. Cal. 2010). And in the  
24 IPO, Spiegel and Murphy each sold 7% of his stock holdings. *See* S1:166. These  
25 percentages are not suspicious. *See Metzler Inv. GMBH v. Corinthian Colls., Inc.*,  
26 540 F.3d 1049, 1067 (9th Cir. 2008) (sale of 37% not suspicious); *Ronconi*, 253  
27 F.3d at 435 (sale of 17% not suspicious).

28 ***“Core Operations Inference” Is Inapplicable.*** The “core operations

1 inference” (§214) is unavailable here. The inference – a *presumption* of knowledge  
2 absent any allegation of scienter – is permitted only in an “exceedingly rare category  
3 of cases.” *S. Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 785 n.3 (9th Cir. 2008). It is  
4 not enough for a plaintiff to make allegations regarding a company’s core business;  
5 the plaintiff must allege facts showing why “scienter need not be alleged.” *In re*  
6 *NVIDIA Corp. Sec. Litig.*, 2010 WL 4117561, at \*10 (N.D. Cal. Oct. 19, 2010).

7 No such facts are alleged here. Instead, Plaintiffs conjecture that, simply “by  
8 virtue of their positions with Snap,” Defendants “would have had” the knowledge  
9 that Plaintiffs impute to them. §§214, 216. That bare-bones assertion provides no  
10 basis for presuming culpable knowledge on the part of Defendants.

11 ***No Inference of Scienter as to Snap.*** By failing to raise a strong inference of  
12 scienter as to any Individual Defendant, *supra* at 19-23, the Complaint fails to raise  
13 such an inference as to Snap itself. *Pittleman v. Impac Mortg. Holdings, Inc.*, 2009  
14 WL 648983, at \*3 (C.D. Cal. Mar. 9, 2009), *aff’d*, 385 F. App’x 714 (9th Cir. 2010).

15 ***Complaint As a Whole Raises No Inference of Scienter.*** The Court must  
16 not only assess the scienter allegations standing alone, but also conduct a “holistic”  
17 review of the same allegations” to determine their effect in combination. *Zucco*, 552  
18 F.3d at 992. Here, the non-fraudulent explanation for Defendants’ conduct is far  
19 more compelling than is Plaintiffs’ theory of securities fraud.

20 In short, Snap’s S-1 fully disclosed (i) its historical DAU figures, (ii) the  
21 competition from Instagram, (iii) Instagram Stories’ mimicry of Snap’s Stories  
22 feature, (iv) the fact that competition from Instagram and others had adversely  
23 affected growth, and (v) the risks that Snap’s user growth rate will decline and that  
24 its DAU may not grow. Snap’s S-1 also made no representations whatsoever about  
25 its future growth rate. On the contrary, it took pains to underscore all the reasons  
26 why Snap’s prospects were uncertain in the face of competition and other factors.  
27 *Supra* at 2-3. And Spiegel’s August 10 comment did not admit growth hacking or  
28 otherwise contradict the May 10 statements. Thus, far from being victims of fraud,

1 Plaintiffs disregarded Snap’s disclosures, misread Spiegel’s comment, and bought  
2 Snap stock. That they now have buyer’s remorse does not state a claim of securities  
3 fraud. *See In re Adolor Corp. Sec. Litig.*, 616 F. Supp. 2d 551, 570 (E.D. Pa. 2009)  
4 (“[B]uyer’s remorse does not entitle [Plaintiffs] to relief under Rule 10b-5.”).

### 5 **III. PLAINTIFFS FAIL TO STATE A SECURITIES ACT CLAIM**

#### 6 **A. Plaintiffs Fail to Allege a False or Misleading Statement or Omission**

7 Plaintiffs’ Securities Act allegations fail for the same reason their Exchange  
8 Act allegations concerning the S-1 fail: the Complaint does not show that the S-1  
9 contained an “untrue statement of a material fact” or “omitted to state a material fact  
10 . . . necessary to make the statements therein not misleading.” 15 U.S.C. § 77k(a) (§  
11 11); *supra* at 6-11 (Instagram Claim alleges no untrue statements or omissions), 11-  
12 16 (same for Pompliano Claim).

#### 13 **B. Plaintiffs Fail to Allege a Violation of SEC Regulations**

14 Plaintiffs offer one allegation unique to the Securities Act claims: violations  
15 of SEC Regulation S-K. But here they add nothing to their prior allegations. They  
16 simply quote language from Regulation S-K’s Items 503 and 303, and repeat the  
17 same alleged omissions. They do not show how Defendants violated the regulations.

18 **Item 503.** Plaintiffs state that this provision requires the S-1 to “discuss” “the  
19 most significant factors that make the offering speculative or risky” and “[e]xplain  
20 how the risk affects the issuer or the securities being offered.” ¶366 (citing 17  
21 C.F.R. § 229.503(c)). But the S-1 is replete with detailed, specific risk factors.  
22 S1:26-58. The risks that Plaintiffs claim were not disclosed – concerning Instagram  
23 and the Pompliano lawsuit – were in fact disclosed. *Supra* at 6-16.

24 **Item 303.** Plaintiffs fail to state a violation of Item 303. They claim that Snap  
25 failed to disclose “the known, adverse trend posed by competition from Instagram’s  
26 Stories.” ¶374. But that *was* disclosed. *Supra* at 6-11. They claim that Snap failed to  
27 disclose “the known uncertainty posed by Pompliano’s allegations that the  
28 Company’s user engagement metric were [sic] unreliable.” ¶375. But that, too, *was*

1 disclosed. *Supra* at 11-16. Plaintiffs' only other allegation simply repeats the  
2 unavailing assertion that Pompiano triggered the correction of DAU figures. ¶375;  
3 *supra* at 16.

4 Moreover, to plead an Item 303 violation, "plaintiff must allege facts showing  
5 defendants knew of an adverse trend." *Belodoff v. Netlist, Inc.*, 2009 U.S. Dist.  
6 LEXIS 39903, at \*32-33 (C.D. Cal. Apr. 17, 2009). Thus, the Item 303 claim fails  
7 because Plaintiffs fail to plead scienter. *Supra* at 19-24. As in *Netflix*, Snap did not  
8 "withh[o]ld information about a known trend or uncertainty," but "repeatedly stated  
9 that success in [its] market depended on multiple factors, especially [Snap's] ability  
10 to keep its [user] base large and happy." *In re Netflix, Inc. Sec. Litig.*, 923 F. Supp.  
11 2d 1214, 1221 (N.D. Cal. 2013); *see* S1:26-27, 74-75.

### 12 **C. The Securities Act Claim Must Be Dismissed for Lack of Damages**

13 The § 11 claim must also be dismissed for lack of damages. *See Pierce v.*  
14 *Morris*, 2006 U.S. Dist. LEXIS 57366, at \*17-18 (N.D. Tex. Aug. 16, 2006).  
15 Damages for claims under § 11 are determined as the difference between the  
16 offering price and the price when suit is brought. 15 U.S.C. § 77k(e). Suit is  
17 brought as of the first-filed complaint, not an amended or consolidated complaint.<sup>11</sup>  
18 To use the date of a later-filed complaint would permit "damage shopping." *Wash.*  
19 *Mut.*, 2010 U.S. Dist. LEXIS 142992, at \*53-54.

20 Plaintiffs' § 11 claim must be dismissed because their damages are *zero*.  
21 Neither Plaintiff claims that he sold shares of Snap's stock before May 16, 2017, the  
22 day the first-filed complaint in this consolidated action was filed. Dkts. 1-1, 72. And  
23 on May 16, 2017, Snap shares were trading at \$20.78 – *above* the offering price of  
24 \$17. Ex. 4. Because the first-filed complaint was filed before the stock price had  
25 ever dropped below the offering price, Plaintiffs could not possibly have damages.

26 For the foregoing reasons, the Complaint should be dismissed.

27  
28 <sup>11</sup> *In re Wash. Mut., Inc. Sec., Deriv. & ERISA Litig.*, 2010 U.S. Dist. LEXIS  
142992, at \*52-53 (W.D. Wash. Oct. 12, 2010); *Pierce*, 2006 U.S. Dist. LEXIS  
57366, at \*5, \*17-18.

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